Supreme Court, U.S.
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No. 99-52

IN THE

Supreme Court of the United States

HERB HALLMAN CHEVROLET, *et al.*,

Petitioners,

v.

DOROTHY NASH-HOLMES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

MELANIE FOSTER
OFFICE OF WASHOE COUNTY
DISTRICT ATTORNEY
195 South Sierra Street
Third Floor
P.O. Box 30083
Reno, Nevada 89520-3083
(775) 328-3400

Attorney for Respondent Washoe County

LARRY R. HICKS
Counsel of Record
PAUL J. GEORGESON
MCDONALD CARANO WILSON
MCCUNE BERGIN FRANKOVICH
& HICKS LLP
241 Ridge Street
Fourth Floor
Reno, Nevada 89505-2670
(775) 788-2000

Attorneys for Respondents Dorothy Nash-Holmes, Donald Coppa, Karl Hall III, Frank Landes, James Long and Michael Neville

154222

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether a prosecutor who has decided to seek an indictment is protected by absolute immunity for presenting evidence to a grand jury after an extensive investigation has been completed and based on an objectively reasonable belief that there was probable cause to arrest the indicted defendants.

II. Whether granting and upholding summary judgment violates the Seventh Amendment and whether Petitioners can raise that argument for the first time in their Petition for Review.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents adopt Petitioners' Constitutional Provisions and Statutes Involved, with the exception, as discussed herein, that issues raised for the first time by Petitioners regarding the Seventh Amendment are not properly before this Court.

STATEMENT OF THE CASE

A. Procedural History

In July of 1993, the Washoe County Nevada Grand Jury issued an indictment against John P. Stanko ("Stanko"), the owner of a Reno Chevrolet dealership, the dealership itself, Hallman Chevrolet ("Dealership"), and fifteen dealership employees ("Salesmen"). In May of 1994, a state court judge dismissed all charges with prejudice.

In January of 1994, before the dismissal of the criminal charges, Stanko and the Dealership filed a civil rights claim against Washoe County, the Washoe County District Attorney, two Assistant District Attorneys, and three investigators employed by the District Attorney ("D.A. Defendants"). In February of 1995, the Salesmen filed a similar lawsuit against all but one of the Defendants named in the Dealership lawsuit.

The D.A. Defendants filed motions to dismiss in both cases. HD 10, SD 20[1]. In the Dealership Case, the Court

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1. HD refers to the district court's docket sheet in the Hallman case. SD refers to the district court's docket sheet in the Salesman (Cont'd)

denied the motion to dismiss and ruled that to the extent the D.A. Defendants sought summary judgment, their motion was premature and would be denied without prejudice. HD 29. In the Salesmen Case, the Defendants moved for a partial Motion to Dismiss on statute of limitations grounds. SD 20. The Court ruled that the two-year statute of limitation barred the Salesmen from pursuing any claims based on actions that arose before February of 1993. SD 33. The Salesmen did not appeal that Order.

In March of 1996, the D.A. Defendants moved for summary judgment in both cases based on qualified immunity and absolute immunity. On August 28, 1996, District Court Judge David Hagen granted partial summary judgment in both cases based on qualified and absolute immunity. Pet. App. 25 (*Hallman* Order); App. 37 (*Van Der Hoeven* Order). With regard to qualified immunity, the district court found that the D.A. Defendants acted in an objectively reasonable manner and were protected by qualified immunity for their actions in investigating the crimes. *See* Pet. App. 33. With regard to absolute immunity, the district court found that the D.A. Defendants were absolutely immune for their respective roles in presenting evidence to the Grand Jury after the decision had been made to seek an indictment. *See* Pet. App. 28 (*Hallman*); App. 39-40 (*Van Der Hoeven*). Plaintiffs moved for reconsideration, which the district court denied. HD 105; SD 78.

The district court entered final judgment on January 13, 1997 and Plaintiffs (Petitioners herein) appealed to the United States Court of Appeals for the Ninth Circuit. After briefing

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(Cont'd)
case. ER refers to the excerpt of record filed by Plaintiffs/Appellants in the Ninth Circuit Court of Appeals. SER refers to the Supplemental Excerpt of Record filed by the Defendants/ Respondents in the Ninth Circuit Court of Appeals.

and oral argument, the Ninth Circuit affirmed the district court's granting of partial summary judgment based on qualified and absolute immunity.[2] Pet. App. 13-16; 169 F.3d 636, 643-44 (9th Cir. 1999). Plaintiffs/Appellants moved for reconsideration and for hearing *en banc*. Both were denied. Pet. App. 21. They then filed this Petition for Writ of Certiorari.

B. Statement Of Facts

The district court and the Ninth Circuit Court reviewed hundreds of pages of exhibits in reaching their respective decisions awarding the D.A. Defendants the protection of qualified and absolute immunity. The great majority of those exhibits were documents that the D.A. Defendants gathered in their exhaustive, year long, investigation before deciding to seek a grand jury indictment. Other documents included deposition transcripts of key witnesses and other discovery obtained in the federal court proceedings. Thus, both the district court and the appellate court judges had, and took, the opportunity to view for themselves the actual evidence gathered by the D.A. Defendants during the investigation phase of the underlying proceedings. The district court, after exhaustively reviewing those documents, found that the D.A. Defendants were entitled to qualified and absolute immunity as a matter of law. The Ninth Circuit, in its opinion filed in this matter, demonstrated that it also carefully reviewed the voluminous evidence that was gathered by the D.A. Defendants during their investigation.

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2. Another issue on appeal to the Ninth Circuit was the district court's granting of attorney's fees to the D.A. Defendants. The Ninth Circuit reversed the district court's determination on that issue. The D.A. Defendants have sought review by this Court of the Ninth Circuit's reversal of an attorney's fees award to the D.A. Defendants in their Conditional Cross-Petition filed contemporaneously with this Opposition.

Instead of reiterating those facts at length herein, Respondents defer to, adopt, and incorporate the portion of the Ninth Circuit's decision that describes those undisputed facts in detail. *See* Pet. App. 5-9; 169 F.3d at 639-42.

In sum, there were two phases to the underlying criminal investigation and prosecution of the Dealership and Salesmen. The first phase was the investigation phase, which began with the sworn criminal complaint of victim Rick Wells. During the investigation phase, the investigators interviewed hundreds of witnesses, including several current and former Dealership employees, some of whom became confidential witnesses. The investigators reviewed in excess of 1,800 sales transaction files. They gathered thousands of pages of documents. When their investigation was complete, and with the help of a police detective who had been heavily involved in the investigation, the investigators drafted a comprehensive report detailing the investigation from the initial Wells transaction to the date of completion of the report. The report summarized the entire case, including all evidence, victims, witnesses, suspects, and other information the investigators had uncovered in their nearly year-long investigation.

The next phase of the proceedings was the indictment phase. The Chief Deputy District Attorney undertook a thorough review of the report and of the evidence gathered over the year-long investigation phase. SER 39-44 (Coppa Affidavit); SER 89-92 (Coppa Supplemental Affidavit). Based upon Coppa's experience with the investigation and his subsequent review of all of the information gathered in the investigation, Coppa determined that in his professional opinion there was probable cause to believe that salesmen, management level employees, the dealership, and its owner,

John Stanko, had engaged in fraudulent practices and indictable offenses. SER 44. Due to the breadth of the investigation, the number of victims, the number of prospective witnesses, and the number of defendants, Coppa decided to present the evidence to the Washoe County Grand Jury for an indictment instead of filing a complaint and taking the case to a preliminary hearing. *Id.*

Coppa began presenting evidence to the Grand Jury on July 8, 1992, thereby officially beginning the indictment phase of the criminal case. In twenty Grand Jury sessions conducted over the following year, the Grand Jury took testimony from 77 witnesses. *See* SER 72-75 (Long Supplemental Affidavit). Approximately 50 of the 77 witnesses were Hallman customers. SER 74. Many testified to transactions in which they either did not know of, or received no credit for, rebates to which they were entitled. SER 197 (Landes Affidavit). Other customers testified that they were sold extended warranties that they either expressly declined or were never notified of. *Id.* Yet others testified to being steered into lease transactions wherein they were not credited for down payments, trade-ins, or rebates. *Id.*

It took nearly a year for Coppa to present to the Grand Jury all of the evidence uncovered in the investigation phase. By August 26, 1992, the Grand Jury had taken testimony from 77 witnesses, had received over 140 exhibits, and had accumulated over 3,200 pages of documents and transcripts. SER 53 (Landes Affidavit 3/27/96); SER 72-88 (Long Supplemental Affidavit 4/22/96). On July 2, 1993, the Grand Jury indicted seventeen Defendants from Hallman, including the dealership itself and John Stanko, its owner, in an eighty-one count indictment. *See* RE 166 (State Court Order). After

obtaining the indictment, Coppa presented the indictment to a state court judge who issued arrest warrants for the indicted defendants and set the trial for May of 1994.

Before trial, the indicted defendants moved to dismiss the indictment. In those proceedings, a Deputy District Attorney, Gary Hatlestad, who had not been involved in the investigation or the presentation of evidence to the Grand Jury, voluntarily dismissed a number of the charges. SER 280-81 (Hatlestad Affidavit). This was because Hatlestad believed the Chief Deputy District Attorney had made a fundamental pleading error in drafting the indictment by failing to identify conduct which would cause an accessory to be responsible as a principal. *See* SER 280-81 (Hatlestad Affidavit). Thus, when A.D.A. Hatlestad reviewed the indictment after it had been filed, he concluded there had been pleading errors with respect to a number of charges. *Id.* Therefore, in court, Hatlestad agreed to dismiss the charges against the indicted Defendants that contained this pleading error. *Id.* But he did not dismiss the charges for those counts against the principals who were believed to have been directly responsible for the crime. *Id.* As Hatlestad told the state court, "[t]here wouldn't be these problems if Mr. Coppa charged the case right." *Id.* He stated that his decision to move to dismiss those charges without prejudice "was based solely on the belief that the counts were not, *as pleaded*, supported by slight or marginal evidence as that phrase is defined under the law." *Id.* (emphasis added). Hatlestad went on to explain that:

> Your affiant has never asserted (nor do I believe) that the Grand Jury proceedings . . . taken as a whole, failed to reveal evidence that these alleged criminal defendants committed no crimes; indeed, given the slight or marginal evidence standard [of

> Nevada law], your affiant believes sufficient evidence was presented to the Grand Jury for it to conclude that each of the named defendants did commit crimes under Nevada law; by the same token, your affiant is informed and does believe that an arresting officer, acting either with or without an arrest warrant, would have had probable cause to believe that each of the named defendants had committed crimes under Nevada law and could have arrested them accordingly.

SER 280-81.

After the District Attorney's office voluntarily agreed to dismiss the defective charges, the indicted Defendants continued to attack the remaining charges. State Court Judge Whitehead agreed with many of the indicted Defendants' arguments. In a lengthy decision, Judge Whitehead dismissed the remainder of the charges with prejudice based on what he found was prosecutorial misconduct and state law violations. RE 166-338.

The District Attorney appealed Judge Whitehead's decision to the Nevada Supreme Court. However, the newly elected District Attorney dismissed the appeal before it was heard. In the meantime, Plaintiffs had already begun prosecuting their § 1983 claims against respondents herein.

REASONS FOR DENYING THE WRIT

I.

THE LAW IS CLEAR THAT ABSOLUTE IMMUNITY PROTECTS A PROSECUTOR FOR HIS ACTIONS IN PRESENTING EVIDENCE TO A GRAND JURY AFTER HE DECIDES TO SEEK AN INDICTMENT BASED ON AN OBJECTIVELY REASONABLE DETERMINATION OF PROBABLE CAUSE.

The primary issue in this case is whether the D.A. Defendants are immune from suit for their activities in presenting evidence to a grand jury after a decision had been made to seek an indictment. The present rule of law on this issue, as most recently spelled out in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) is clear and unambiguous: a prosecutor is protected by absolute immunity for his actions in presenting evidence to a grand jury to seek an indictment. 509 U.S. at 273.

This Court has adopted a "function test" to determine if a prosecutor is entitled to the protection of absolute immunity. *See Buckley*, 509 U.S. at 269. To determine if absolute immunity applies to a given situation, the court looks to the nature of the function that is being performed, as opposed to the identity of who is performing it. *Id.* (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)). Thus, the Court has recognized the difference between an advocate's evaluation of evidence and interviewing of witnesses as he prepares for trial, and a detective's role in searching for clues and corroboration in support of an arrest. *Id.* at 273.

As this Court stated in *Buckley*, "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial and which occur in the course of his role as an advocate for the state, are entitled to the protections of absolute immunity." *Id.* The Court clarified its holding by noting that those acts that fall within the protection of absolute immunity "must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Id.*; *see also Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976) (stating that "in initiating a prosecution and in presenting the State's case, the prosecution is immune from a civil suit for damages under § 1983).[3]

The rule that a prosecutor is immune from suit for his actions before a grand jury is not a new one. *See Imbler v. Pachtman*, 424 U.S. 409, 421-22 (1975) (discussing history of doctrine now identified as absolute prosecutorial immunity). The first American case to discuss a prosecutor's amenability to suit for his role in initiating a criminal prosecution was *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001 (1896). *See Imbler*, 424 U.S. at 421. There, a plaintiff charged that the prosecutor maliciously added a plaintiff's name to a grand jury true bill without probable cause after the grand jury refused to indict him. *Id.* The Indiana Supreme Court dismissed the case, finding that a prosecutor was absolutely immune from prosecution of such a claim. *Id.* (citing *Griffith*, 44 N.E. at 1002). That view became the law of the land. *Id.* at 422.

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3. Although the *Buckley* court was divided in its decision in that case based on the facts of the case, both the majority and the dissent agreed with this statement of the law with respect to absolute immunity.

This Court first addressed the issue of prosecutorial immunity for actions before a grand jury in *Yaselli v. Goff*, 275 U.S. 503 (1927). In *Yaselli*, plaintiff sued the Special Assistant to the Attorney General of the United States, alleging that the prosecutor procured the plaintiff's grand jury indictment by the willful introduction to the grand jury of false and misleading evidence. *Yaselli v. Goff*, 12 F.2d 396, (1926). The Second Circuit found that the prosecutor was protected by absolute immunity and this Court affirmed. 275 U.S. 503 (1927).

The modern day analysis of absolute immunity under § 1983 began with *Imbler v. Pachtman*, 424 U.S. 409, 421-22 (1975). In *Imbler*, plaintiff claimed that a prosecutor conspired to unlawfully charge and convict plaintiff by allowing false evidence at trial and while having knowledge that Imbler was actually innocent. *Id.* at 415-16. The Court reviewed the history of absolute prosecutorial immunity as it developed in common law. *Id.* at 421-25. The Court then ruled that the same immunity should apply to claims under § 1983. *Id.* at 427. Thus, the Court held that "in initiating a prosecution and presenting the State's case, the prosecutor is immune from civil suit for damages under § 1983." *Id.* at 431. This Court has used several cases since *Imbler* to define the boundaries of that holding.

In *Malley v. Briggs*, 475 U.S. 335 (1986), a police officer asserted a defense of absolute immunity for his alleged role in applying for arrest warrants. 475 U.S. at 339. The officer analogized his role in applying for arrest warrants to a prosecutor's role in asking a grand jury to indict. *Id.* at 341-42. The Court rejected the analogy, and found that the officer was not protected by absolute immunity. *Id.* at 343. In doing so, the Court discussed why a prosecutor is immune for his actions in seeking an indictment from a grand jury:

> Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus, we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.

Id.

Buckley v. Fitzsimmons, 509 U.S. 259 (1993), stands as the definitive modern ruling on absolute immunity. In *Buckley*, the plaintiff claimed that the prosecutor violated § 1983 by making false statements at a press conference and by fabricating evidence during a preliminary investigation of a crime. This Court, noting that the principles applied to determine the scope of immunity for state officials under § 1983 "are by now familiar," discussed the history of absolute immunity and its application to § 1983. 500 U.S. at 267-68.

The Court reiterated that it uses a functional approach in determining the confines of absolute immunity protection, and discussed previous cases where it applied that functional test. *Id.* at 270-71 (discussing *Imbler*, *supra* and *Burns v. Reed*, 500 U.S. 478 (1991)). The Court noted that in *Burns v. Reed*, 500 U.S. 478 (1991), it found that the prosecutor's acts of giving legal advice to the police were not completed in his role as an advocate for the state, and were not "intimately associated with the judicial phase of a criminal proceeding." *Id.* at 271. Thus, those activities were not protected by absolute immunity. *Id.* As the Court noted, "a

prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." *Id.* at 273 (citing *Burns*).

However, this Court went on to clarify its previous rulings in a statement that is central to the dismissal of plaintiffs' claims in this case, stating:

> We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of criminal proceedings or for trial, and which occur in the course of his role as an advocate for the state, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

Id.

In 1997, this Court was presented with the issue of whether a prosecutor is absolutely immune for her role in making false statements in an affidavit for an application for an arrest warrant where the prosecutor swore to the truth of those statements. *See Kalina v. Fletcher*, 522 U.S. 118 (1997). The Court found that by swearing to the truth of the statements, the prosecutor was acting in the role of a complaining witness, and not as an advocate for the state in a proceeding intimately associated with the judicial process. *Id.* at 509-10. Therefore, this Court found that she was not absolutely immune for those acts. *Id.* at 510. However, the

Court confirmed its position with regard to actions taken before a grand jury and its holdings in *Burns* and *Malley* where the Court discussed that a prosecutor is absolutely immune for his actions in seeking an indictment from a grand jury. *Id.* at 508 (discussing that in *Burns*, after noting a "consensus among the Courts of Appeals concerning prosecutorial conduct before Grand Juries," the court granted the same absolute immunity protection for appearing in court at a probable cause hearing); *Id.* at 506-06 (discussing *Malley*, wherein the court acknowledged that a prosecutor was protected by absolute immunity for seeking an indictment from the Grand Jury).

Thus, it is the clear and unambiguous law of the land that a prosecutor who presents evidence to a Grand Jury in order to seek an indictment is protected from suit by absolute prosecutorial immunity. Presenting evidence to a Grand Jury for indictment is unquestionably the function of a prosecutor, and only a prosecutor. Further, the process of presenting evidence to a Grand Jury to seek an indictment is intimately associated with the judicial process. Therefore, those actions fall well within the confines of absolute prosecutorial immunity.

II.

THE LOWER COURTS UNDERSTOOD, PROPERLY CITED, AND CORRECTLY APPLIED THIS COURT'S DECISIONS ON ABSOLUTE IMMUNITY TO THE UNDISPUTED FACTS OF THIS CASE.

As discussed above, the D.A. Defendants began presenting evidence to the Grand Jury only after a nearly year-long investigation led the Chief Deputy District Attorney to conclude that there was probable cause to arrest

the indicted defendants. Because of the enormous volume of documentation, and because of the large number of witnesses, the Chief Deputy District Attorney made the decision to seek an indictment through use of the grand jury. He presented the evidence over a one year period and, when he had finished the presentation of the evidence gathered in the investigation phase, the grand jury issued its indictments. Based on the grand jury indictments, a state court judge then issued arrest warrants for the indicted defendants.

Based on the well-established law of absolute immunity, the D.A. Defendants moved for summary judgment based on absolute immunity for all actions taken by them with regard to presenting evidence to the Grand Jury. The district court, after full briefing and after the submission of hundreds of pages of evidence (most of which was the evidence gathered by the investigators during the investigation phase of the state court criminal proceedings) agreed that those activities taken by the D.A. Defendants during the indictment phase were protected by absolute prosecutorial immunity. The district court found that "the D.A. defendants have met their burden of showing that absolute immunity is justified for their actions following the initiation of proceedings before the grand jury, which began July 8, 1992." *Hallman* Order dated Aug. 26, 1996 (Pet. App. 28); *See also Van Der Hoeven* Order dated Aug. 26, 1996 (Pet. App. 38-39). The plaintiffs moved for reconsideration, making the same arguments that they would later make to the Ninth Circuit Court of Appeals. The district court denied the motions for reconsideration, HD 105; SD 78.

Plaintiffs then appealed to the Ninth Circuit Court of Appeals. However, a unanimous panel of the Ninth Circuit Court of Appeals agreed with the district court, finding that because

the D.A. defendants "functioned as advocates in the grand jury proceedings," they were entitled to absolute immunity for their roles in those proceedings. Pet. App. 13-14; 169 F.3d at 643. Plaintiffs moved for reconsideration and for hearing *en banc* at the Ninth Circuit. Both motions were denied. Pet. App. 23.

Plaintiffs argued in the district court, at the appeals court, and as they do now, that there is an exception to the general rule of absolute immunity that applies in this case based on the specific facts of this case. The argument is based on dicta from *Buckley* where this Court distinguished between a grand jury that was used to seek indictment and a grand jury that was used solely for a preliminary investigation of an unsolved crime. *Buckley v. Fitzsimmons*, 509 U.S. 259, 274-75 (1993). Therein, this Court, in explaining why the prosecutor's actions were investigatory in nature (and therefore were not protected by absolute immunity), stated that:

> A prosecutor neither is, nor should he consider himself to be, an advocate before he has probable cause to have anyone arrested. It was well after the alleged fabrication of false evidence concerning the bootprint that a special grand jury was impaneled. And when it finally was convened, its immediate purpose was to conduct a more thorough investigation of the crime — not to return an indictment against a suspect whom there was already probable cause to arrest. . . . Under these circumstances, the prosecutor's conduct occurred well before they could properly claim to be acting as advocates.

Id. at 274-75. Relying on that language, Plaintiffs have repeatedly made two arguments that absolute immunity does

not protect the D.A. Defendants in this specific case: (1) there was no probable cause to arrest plaintiffs at the time the D.A. Defendants began presenting evidence to the grand jury; and (2) the grand jury was used solely as a preliminary investigation of an unsolved crime, not in order to seek an indictment. However, the district court and the Ninth Circuit Court, after a careful review of the record in this matter, properly rejected those fact-based arguments.

In dismissing Plaintiffs' claims at the trial level, the district court specifically acknowledged Plaintiffs' claims that the D.A. Defendants lacked probable cause when they went before the grand jury and the grand jury was used as an "investigative tool." Pet. App. 28. The district court responded to those arguments as follows:

> In contrast, the D.A. defendants have succeeded in showing they had probable cause when Coppa first went before the grand jury, that thereafter his actions and the actions of the other prosecutors and investigators largely consisted of preparing evidence for presentation to the grand jury, and that the lengthy period before which an indictment was returned mainly was due to the volume of charges and defendants.

Pet. App. 29. That determination was based on a review by the court of hundreds of pages of exhibits and documentary evidence that showed what took place during the investigation phase of the criminal proceedings as well as sworn deposition testimony of the Chief Deputy District Attorney who made the decision to seek an indictment from the Grand Jury.

The plaintiffs moved for reconsideration of the district court's decision, arguing that the district court did not thoroughly analyze plaintiffs' arguments and exhibits. *See* Order dated November 7, 1996. HD 105; SD 78. The district court denied the motions, however, finding that it was "neither timely nor well-founded." *Id.*

After being denied their motions for reconsideration in the trial court, Plaintiffs appealed to the Ninth Circuit Court of Appeals. There, they reiterated the same arguments, as well as argued that the district court's entry of summary judgment based on immunities was improper because there remained disputed issues of material fact. The Ninth Circuit reviewed the district court's decisions regarding immunities *de novo*. 169 F.3d at 642, Pet. App. 10. The Ninth Circuit also carefully reviewed the myriad exhibits and documentary evidence upon which the lower court's decisions were based. Based upon that *de novo* review, and properly citing the relevant controlling United States Supreme Court decisions, the Ninth Circuit first addressed the issue of whether the grand jury was simply an investigatory tool. It rejected that argument, holding that:

> [t]he Washoe prosecutors functioned as advocates in the grand jury proceedings. By the time the grand jury was impaneled, the Washoe prosecutors had completed a vast majority of the investigation and, prior to the impanelment, virtually every witness had been interviewed and every exhibit compiled.

Pet. App. 13-14; 169 F.3d at 643.

The court then turned to plaintiffs' arguments that the D.A. Defendants did not have probable cause when they began the grand jury phase. After detailing the facts of the entire investigation that occurred before the grand jury proceedings, the Ninth Circuit Court held that:

> In the present case, the Washoe prosecutors had probable cause exceeding that recognized in *Boueri*. After a year-long investigation, the Washoe prosecutors had compiled hundreds of supporting documents and interviewed dozens of witnesses, including former employees and customers. As a result of this investigation, the Washoe prosecutors had ample and convincing evidence that Hallman Chevrolet employees had forged customers' signatures, withheld rebates, retained customer down-payments intended to reduce principal balances and made material misrepresentations to customers.

Pet. App. 15; 169 F.3d at 644. Thus, the appeals court affirmed the district court's grant of summary judgment based on absolute immunity.

The Ninth Circuit also directly addressed Plaintiffs' arguments regarding the voluntary dismissal of many of the criminal charges by the ADA during the criminal proceedings. The Court found that Deputy District Attorney Hatlestad did not "admit" there was no probable cause. *Id.* The Court, after reviewing the evidence, found instead that "[c]ontrary to Hallman Chevrolet's position, D.D.A. Hatlestad's statement actually affirms the existence of probable cause." *Id.* at App. 14-15.

The Ninth Circuit, in upholding summary judgment, acknowledged, discussed, and properly followed controlling Supreme Court and statutory law with respect to absolute immunity. In reviewing the decision of the district court, the Ninth Circuit cited to and applied the proper standard of review. A district court judge, after its independent review of the facts, found that there was probable cause to seek an indictment of the plaintiffs. The Ninth Circuit, upon its independent review of the facts, unanimously agreed.

Petitioners seek clarification from this Court where no clarification is needed. Neither the district court nor the Ninth Circuit wrestled with what law to apply or how to apply it to the undisputed facts of this case. The district court properly reviewed the material facts and the Ninth Circuit, in a *de novo* review, completely and wholly agreed with the district court's factual determinations. As the law of absolute immunity is clear and unambiguous in this context, Petitioners essentially ask this Court to take on a role of a trial court to review factual findings that were made consistently and unanimously by the lower courts. Such is clearly not the proper role of the United States Supreme Court.

III.

THE LOWER COURTS DID NOT IMPROPERLY REJECT THE PURPORTED FINDINGS OF THE STATE TRIAL COURT.

In determining whether to grant certiorari, this Court looks for, among other things, conflicts between a lower court and this Court, between two federal circuit courts of appeal, or between a federal court and a state court of last resort.

SCR 10. None of those factors appear in this case. However, Petitioners argue that there is a conflict between the lower federal court decisions in this case and a decision of the state court trial judge who dismissed the criminal charges.

Petitioners argue that the federal courts that ruled on this civil rights case should give comity to the state trial court's findings in the underlying criminal case. First, it must be noted that Petitioners cite not a single case in their Petition, from this Court or otherwise, to support their argument. Second, Petitioners raised this same argument in the courts below in the context of estoppel. However, the Ninth Circuit properly rejected the Petitioners' estoppel argument based on the specific facts of this case. *See* Pet. App. 16. In sum, both lower courts considered the state trial court decision and gave that decision the deference that it was due. Both lower courts realized that the state court opinion, while it may have been the genesis of the civil rights claims herein, was not dispositive of federal civil rights claims. There is simply no basis for further review of those lower courts' decisions on this issue.

IV.

CERTIORARI SHOULD BE DENIED AS TO PETITIONERS' SEVENTH AMENDMENT CLAIM, SINCE THEY ARE ASSERTING IT FOR THE FIRST TIME AND NO EXCEPTIONAL CIRCUMSTANCES EXIST WHICH WOULD WARRANT CONSIDERATION OF THIS CLAIM.

In their Petition for Writ of Certiorari, Petitioners assert for the first time in this litigation that the Seventh Amendment right to jury trial should preclude the granting

of summary judgment on the basis of immunity "when there are material facts in dispute." Petitioners did not raise this issue before the Ninth Circuit Court of Appeals; thus, it formed no part of the basis for the lower court's decision.

In the past, this Court has refused to review arguments which were raised for the first time on appeal and were not considered by the court below. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988) (Stating that "[w]e shall deal with the case as it came here and affirm or reverse on the ground relied on below."); *see also Matsushita Electrical Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 379, n.5 (1996). The exception to this rule is limited and has been sparingly applied "only in exceptional cases coming . . . from the federal courts." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)).

Among the cases which have been considered exceptional enough to warrant departure from the rule is *Pollard v. United States*, 352 U.S. 354 (1957). In *Pollard*, the collateral consequences of an unrepresented defendant's criminal sentence were found to be sufficiently substantial to allow the Court to deal with an issue which had not been raised below by the defendant in a pro se habeas corpus proceeding. 352 U.S. at 359. In a later civil case, the resolution of a conflict between state welfare statutes and the federal Social Security Act was deemed significant enough to justify a remand to the district court to allow the appellant to litigate a Supremacy Clause argument which had been raised for the first time before the Supreme Court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). In another case involving exceptional circumstances, the Court found that the "important, recurring issue" of the availability of a direct

remedy under the Constitution where the facts alleged also supported an action under the Federal Tort Claims Act warranted departure from the rule. *Carlson v. Green*, 446 U.S. 14, 16-17 (1980).

Unlike those unusual situations where consideration was given to an argument raised for the first time before this Court, Petitioners have not raised an exceptional or compelling issue in their Petition for a Writ of Certiorari which would excuse departure from the Court's usual rule. It is well established in this Court's jurisprudence that summary judgment does not violate the Seventh Amendment, since there is no right to a jury trial in civil cases unless there are issues of fact to be determined. *In Re Peterson*, 253 U.S. 300, 310 (1920); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902). Further, despite Petitioners' characterization of this as an issue of law, they are actually asserting error in the form of erroneous factual findings. In its decision, the Ninth Circuit Court of Appeals expressly found that whatever issues of fact may have existed were not material and thus did not preclude the granting of summary judgment. Pet. App. 13; 169 F.3d 636, 643 (9th Cir. 1999). Factual error is not a compelling basis for the issuance of a writ of certiorari pursuant to Supreme Court Rule 10. Accordingly, the Petition should be denied.

CONCLUSION

Petitioners argue here, as they did in opposing summary judgment, in moving for reconsideration, in appealing final judgment, in moving for rehearing, and in applying for an *en banc* review, that the lower courts did not get the facts right. They argue that it was wrong for the lower courts to find probable cause based on the evidence that was before those courts. They argue that there were material issues of disputed facts with regard to the application and issuance of search warrants. Those factual arguments have been repeatedly heard and properly rejected on every occasion that they have been set forth. Yet Petitioners continue to make them, despite this Court's admonition that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . ." SCR 10.

Petitioners do not, and can not, argue that there is a conflict between the decision of the Ninth Circuit and the decision of this Court, another federal court of appeal, or the Nevada Supreme Court. Further, they do not argue that the district court or the Ninth Circuit Court of Appeals applied the wrong law to the case. For these reasons, and as fully discussed herein, the D.A. Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

LARRY R. HICKS
Counsel of Record
PAUL J. GEORGESON
MCDONALD CARANO WILSON
MCCUNE BERGIN FRANKOVICH
& HICKS LLP
241 Ridge Street
Fourth Floor
Reno, Nevada 89505-2670
(775) 788-2000

Attorneys for Respondents
Dorothy Nash-Holmes, Donald
Coppa, Karl Hall III, Frank Landes,
James Long and Michael Neville

MELANIE FOSTER
OFFICE OF WASHOE COUNTY
DISTRICT ATTORNEY
195 South Sierra Street
Third Floor
P.O. Box 30083
Reno, Nevada 89520-3083
(775) 328-3400

Attorney for Respondent
Washoe County